

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

RECEIVED

SEP 14 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

)  
Amendment of the Commission's )  
Rules to Establish New )  
Personal Communications )  
Services )

GEN Docket No. 90-314  
RM-7140, RM-7175,  
RM-7168

To: The Commission

ORIGINAL

**REPLY TO OPPOSITION TO  
PETITION FOR RECONSIDERATION**

Puerto Rico Telephone Company ("PRTC"), by its attorneys, and pursuant to Section 1.429(g) of the Commission's Rules, 47 C.F.R. § 1.429(g), respectfully submits this Reply to the Opposition to Petition for Reconsideration ("Opposition") filed by Pegasus Communications, Inc. ("Pegasus") on August 30, 1994 in the above-captioned proceeding.

**I. INTRODUCTION**

In the Second Report and Order<sup>1</sup> in the above-captioned proceeding, the Commission adopted rules for licensing broadband Personal Communications Services ("PCS") in service areas based on Major Trading Areas ("MTAs") and Basic Trading Areas ("BTAs"). As originally adopted, the rules defined 492 BTA-based license areas, including 487 licenses based on the BTA definitions in the Rand McNally 1992 Commercial Atlas & Marketing Guide,

---

<sup>1</sup> Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket 90-314, Second Report and Order, FCC 93-451, 8 FCC Rcd 7700, 73 RR 2d 1477 (1993) ("Second Report and Order").

No. of Copies rec'd  
List A B C D E

011

123rd Edition ("Atlas") and 5 licenses based on insular BTA-like service areas, including one BTA-like license for Puerto Rico.

In the Memorandum Opinion and Order,<sup>2</sup> and in response to a petition for reconsideration ("Pegasus Petition") and an ex parte presentation ("Ex Parte") by Pegasus, the Commission amended its definition of the PCS service areas to provide for two BTA-like licenses for Puerto Rico. PRTC filed a petition for reconsideration ("PRTC Petition") of this modification of the rules,<sup>3</sup> demonstrating that the public interest would not be served by dividing Puerto Rico into two BTA-like service areas. In its Opposition, Pegasus raises certain procedural arguments, asserting that the PRTC Petition is untimely and unsupported, and implying that PRTC should have participated earlier in the proceeding. Pegasus also argues that the PRTC Petition is unpersuasive on the merits.

Despite Pegasus' contentions to the contrary, the PRTC Petition was clearly allowed under the Commission's Rules and precedent, regardless of the stage at which PRTC began participating in the proceeding. Consideration of the facts in the PRTC Petition is required to protect the public interest, to ensure the impartiality of the rulemaking process. Furthermore, the facts presented by PRTC address the very factors considered when the Commission, on a neutral and impartial basis, originally established broadband PCS service

---

<sup>2</sup> Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Memorandum Opinion and Order, FCC 94-144, 75 RR 2d 491 (released June 13, 1994) ("MO&O").

<sup>3</sup> As Pegasus noted in the Opposition, prior counsel for PRTC inadvertently cited Section 1.106(a)(1) of the Commission's Rules, 47 C.F.R. § 1.106(a)(1), as authority for filing the PRTC Petition. Opposition at n.1. The proper citation should be to Sections 1.429(a) and 1.429(i). See 47 C.F.R. §§ 1.429(a), 1.429(i).

areas; therefore, such facts are relevant and persuasive.

## II. ARGUMENT

### A. The PRTC Petition Was Timely And Proper, And Necessary To Protect The Public Interest

Pegasus attempts to portray the PRTC Petition as an untimely opposition to the Pegasus Petition, see Opposition at 3, and suggests that PRTC may not raise its arguments now since PRTC did not participate in the proceeding at an earlier stage, citing instances in which public notice of the Pegasus Petition was given. Id. However, this argument clearly ignores the Commission's Rules and precedent regarding reconsideration of rulemaking proceedings.

Section 1.429(i) of the Commission's Rules provides, in pertinent part, that:

Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order.

47 C.F.R. § 1.429(i). In this case, the modification of the broadband PCS service areas for Puerto Rico by the MO&O is clearly a matter subject to reconsideration. Moreover, Commission precedent makes clear that Section 1.429 "contains no requirement that parties not participating in earlier stages of [a notice and comment rule making] proceeding make a showing as to why they did not participate." See FM Channel Assignments, 49 RR 2d 703, 705 at n.5 (Broadcast Bureau 1981). Therefore, provided it otherwise complies with Section 1.429, PRTC may properly petition for reconsideration of such a modification; to accept Pegasus' argument would render meaningless the provision of Section 1.429 cited supra, and would be contrary to precedent.

Next, Pegasus alleges that PRTC does not comply with Section 1.429(b) of the Rules, placing particular emphasis on the subsections which relate to when the facts relied upon by PRTC may have occurred, and when such facts may have otherwise been presented to the Commission. See Opposition at 5. Pegasus also attacks the manner in which PRTC presented the facts relied upon (among other arguments suggesting that the facts must be supported by declarations or affidavits), and compares the PRTC Petition to the documentation supplied with the Pegasus Petition. Id.

As an initial matter Section 1.429, unlike some other Commission Rules,<sup>4</sup> does not require declarations, affidavits or any of the other levels of support Pegasus alleges is required for petitions for reconsideration in rulemaking proceedings. Rather, in rulemaking proceedings parties may participate "through submission of written data, views, or arguments," see 47 C.F.R. § 1.415(a), and on reconsideration a party need only "state with particularity" the respects in which the action should be changed, see 47 C.F.R. § 1.429(c), a much different standard.<sup>5</sup> The PRTC Petition simply submits PRTC's particular views and arguments (Pegasus does not assert that the PRTC Petition lacks particularity), supported by facts which are generally available to the public.

---

<sup>4</sup> See, e.g., 47 C.F.R. § 73.3584(b) (petitions to deny broadcast applications, and related pleadings, must be supported by affidavit); § 73.3584(c) (petitions to deny low power TV, TV translator or TV booster applications, and related pleadings, must be supported by certification); and § 22.30(a)(3) (oppositions or petitions to deny public mobile service applications must be supported by affidavit).

<sup>5</sup> PRTC notes that Pegasus itself must be aware that declarations or affidavits of persons with personal knowledge are not required, since neither the Pegasus Petition nor Ex Parte were supported by such a declaration or affidavit.

The PRTC Petition also fully complies with Section 1.429(b). Although Pegasus barely mentions the subsection, the PRTC Petition falls squarely within Section 1.429(b)(3): consideration of the facts relied upon is required to protect the public interest. See 47 C.F.R. § 1.429(b)(3); see also Additional Private Radio Service, 1 FCC Rcd 5, 6, 61 RR 2d 276, 279 (1986)(reconsideration allowed on new facts "when the Commission determines that subsequent consideration is required to protect the public interest"). This mandate to the Commission to protect the public interest is quite broad, and applicable to the PRTC Petition. In this instance, consideration of the facts presented by PRTC is required to protect the public interest in two respects. First, as discussed more fully below and in the PRTC Petition, a single BTA-like license for Puerto Rico most accurately reflects the "natural flow of commerce" and other factors weighed by the Commission in establishing PCS service areas, and would best facilitate low cost service to the public.

Second, reversal of the MO&O on this point would protect the public interest from PCS service areas gerrymandered to suit the needs of one specific party. When the Commission originally defined license areas for PCS, it did not consider or favor the special geographic service area needs or requests of any given party. Rather, the Commission adopted the 487 BTAs defined by Rand McNally, on a neutral and independent basis, as PCS service areas. Similarly, for areas within the Commission's jurisdiction but not covered by the Atlas, such as Puerto Rico, the BTA-like service areas were originally defined without favoritism to any party, based on "insular" areas.<sup>6</sup>

---

<sup>6</sup> The Commission licensed "five insular areas," including Puerto Rico as well as American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands, as BTA-like areas. See 47 C.F.R. § 99.13, as published in the Second Report and Order, Appendix A at 20-21.

PRTC asserts that it is unreasonable and fundamentally unfair for the Commission to define PCS service areas which favor the needs of particular potential bidders,<sup>7</sup> and urges the Commission to protect the public interest in the fairness and impartiality of the Commission's processes by restoring the definition of the PCS service areas for Puerto Rico to one BTA-like license as originally adopted on an impartial basis in the Second Report and Order. The Commission considered and rejected smaller fragmented service areas and special interests when adopting rules for PCS, and should do so now.<sup>8</sup>

**B. The Facts Presented In The PRTC Petition Support The Need For One BTA-Like PCS Service Area For Puerto Rico**

In the PRTC Petition, PRTC demonstrated that the unitary BTA originally adopted by the Commission reflected the "natural flow of commerce" in Puerto Rico, based on the specific factors considered by Rand McNally when defining BTAs for the Atlas. See PRTC Petition at 2-3. Pegasus countered that the facts presented by PRTC are unpersuasive or

---

<sup>7</sup> PRTC notes that the geographic area proposed by Pegasus for the Mayaguez/Aguadilla-Ponce BTA happens to encompass the Pegasus' cable television franchise area, and would appear to favor any PCS plans that Pegasus may have. In an apparent double standard, Pegasus suggests that PCS market boundaries should not follow the wireline exchange boundaries of local exchange carriers, see Opposition at 12, after previously arguing for two BTAs that would be "consistent with the county assignments made by the Puerto Rico Public Service Commission in the 1980's in establishing cable television franchise areas." See Pegasus Petition at 6. The self-serving nature of the Pegasus proposal was thinly-veiled; Pegasus went so far as to state that its proposed division "has the added feature of not impairing any existing cable television operations that might want to participate in PCS licensing." Id.

<sup>8</sup> See Second Report and Order at ¶¶ 73-74 (rejecting smaller PCS service areas based on MSAs and RSAs due to the "unnecessary fragmentation of natural markets," and listing benefits of larger service areas, such as roaming, reduced cost of interference coordination and microwave relocation, and simplified coordination of technical standards, among other benefits).

unsupported; see Opposition at 6-12; PRTC will address Pegasus' arguments in turn.

First, Pegasus alleges that the mountains in Puerto Rico are an obstacle to intra-island travel, and that the mountains "make intra-island travel an arduous process." Id. at 6. Pegasus also asserts that the road infrastructure in Puerto Rico is inadequate. Id. at 7. However, these allegations are not supported by even Pegasus' own submissions; for example, the community profile for the Mayaguez area states that "[a]n extensive highway system provides easy, efficient access from any location on the Island to the Mayaguez area's industrial sites." See Pegasus Petition, Exhibit II; see also Ex Parte, Exhibit D. PRTC agrees with the description in the community profile, submitted by Pegasus, which portrays the highway system as extensive and as providing easy, efficient access around Puerto Rico.

Pegasus also argues that "geographic size is not relevant" when defining BTAs (despite previously using geographic size as a primary argument),<sup>9</sup> see Opposition at 8, draws comparisons based on the roads and distances between certain other BTAs, id., and compares populations among various BTAs. Id. PRTC maintains that geographic size is relevant, contrary to Pegasus' most recent assertions, and notes that the Commission considered "physiography"<sup>10</sup> when defining PCS service area boundaries. See Second Report and Order at ¶ 73. However, PRTC agrees that size, highway infrastructure, population and such factors are not determinative -- if determinative, an infinite number of PCS service area definitions (for

---

<sup>9</sup> See Pegasus Petition at 2-3 (stating "the Commission should closely examine the size" of Puerto Rico, and that "[d]ue to the size and mountainous terrain of the island, Puerto Rico is essentially split in half," among other references to size).

<sup>10</sup> "Physiography" is defined as "physical geography," which would include the physical size of the geographic area. See Webster's Ninth New Collegiate Dictionary, 888 (Merriam-Webster Inc. 1988).

the United States and related territories and possessions) could be rationalized using such factors. PRTC contends that the Commission should not attempt to draw arbitrary distinctions based on such factors, but rather the Commission should restore the only license definition for Puerto Rico adopted on an impartial basis; that is, the original single BTA-like license area.

Pegasus next characterizes the facts submitted by PRTC regarding banks, universities, media, shipping ports and airports in Puerto Rico as irrelevant, unimportant, or without merit. Opposition at 9-10. However, among the factors considered by the Commission (and Rand McNally) when defining PCS service areas were newspaper circulation, economic activities, highway facilities and suburban transportation. See Second Report and Order at ¶ 73; see also Atlas at 39. The PRTC Petition addressed newspaper circulation directly; shipping ports and airports were discussed to demonstrate the extent to which the highway facilities are used, and such factors as well as the banking information are related to "economic activities" on the island. Last, other media (such as major television and radio stations) and universities, as well as the information submitted regarding government agencies, trucking, and passenger travel, serve to demonstrate that the economic activity and natural flow of commerce in Puerto Rico is truly island-wide. Regardless, PRTC submits that such facts (as well as whatever facts the Commission may have considered in originally defining PCS service areas in the Second Report and Order) are a more appropriate basis for determining fair and impartial PCS service areas than facts submitted after-the-fact by individual parties (such as Pegasus) that may attempt to tailor the facts to serve private rather than public interests.



Finally, PRTC notes that in the Opposition, Pegasus makes reference to the Second Memorandum and Order<sup>11</sup> in this proceeding, in which the Commission also modified the service areas for narrowband PCS to provide for two BTA-like licenses. See Opposition 5 and 12. PRTC asks the Commission to note that this modification is still subject to reconsideration,<sup>12</sup> and that PRTC, as well as other parties, may timely file petitions for reconsideration. PRTC requests that the Commission, to the extent that it gives weight to its actions in the Second MO&O in its consideration of the PRTC Petition, also consider the arguments raised in any such timely-filed petitions for reconsideration.

### III. CONCLUSION

The Commission clearly has the authority to consider the facts and arguments presented by PRTC in order to protect the public interest, despite the procedural arguments Pegasus attempts to make in the Opposition. As demonstrated by PRTC, one BTA-like PCS service area for Puerto Rico best reflects the natural flow of commerce, would facilitate the provision of lower cost service to the public, and would reassure the public's confidence in the fairness and impartiality of the rulemaking process. Furthermore, one BTA would facilitate the provision of lower cost service in Puerto Rico, an argument which Pegasus did not attempt to

---


<sup>11</sup> Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314 and ET Docket No. 92-100, Second Memorandum Opinion and Order, FCC 94-218 at ¶ 18 (released August 25, 1994) ("Second MO&O").

<sup>12</sup> Notice of the Second MO&O was published in the Federal Register on September 7, 1994, see 59 Fed. Reg. 46195; therefore, petitions for reconsideration are due within 30 days of that date, or by October 7, 1994. See 47 C.F.R. § 1.429(d).

refute. Based on these factors, PRTC asserts that the originally adopted definition of one BTA-like PCS license area for Puerto Rico would best serve the public interest.

WHEREFORE, for the reasons set forth herein and in the PRTC Petition, PRTC respectfully requests that the Commission reconsider its decision to create two BTA-like service areas in Puerto Rico for the licensing of PCS and reinstate the previously adopted definition of one BTA-like license for Puerto Rico.

Respectfully submitted,  
**PUERTO RICO TELEPHONE COMPANY**

By   
David A. Irwin  
Jeffrey L. Timmons  
Its Attorneys

Irwin, Campbell & Crowe, P.C.  
1320 18th Street, N.W.  
Suite 400  
Washington, D.C. 20036

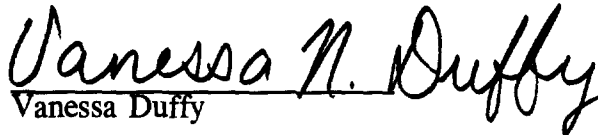
(202) 728-0400

September 14, 1994

**CERTIFICATE OF SERVICE**

I, Vanessa Duffy, hereby certify that on this 14th day of September, 1994, copies of the foregoing "REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION" have been served by first class United States mail, postage prepaid, upon the following:

James E. Meyers, Esq.  
Susan R. Athari, Esq.  
Baraff, Koerner, Olender & Hochberg, P.C.  
5335 Wisconsin Avenue, N.W.  
Suite 300  
Washington, D.C. 20015

  
Vanessa Duffy